88-1966

No. _____

Supreme Court, U.S.
FILED
JUN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

PATRICK M. ZILL,
Petitioner,

vs.

AVIS-RENT-A-CAR SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

THELMA C. FURRY
50 Munroe Falls Avenue
Munroe Falls, Ohio 44262
(216) 688-4047
Counsel of Record
for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

QUESTIONS PRESENTED

(a) Is there a denial of Due Process when the District Court concluded on Summary Judgment Motion without a hearing that Petitioner was an at-will employee, when the Rules of Respondent forbid termination at-will of its Avis-Non-Union Employees?

(b) Where employer acts in a dual capacity, as employer and as a labor relations person towards its Avis-Non-Union Employees as outlined in the Benefit's Manual, what duty does such employer owe its employee before termination of employment?

(c) Did the District Court and the District Court of Appeals err in failing to find that Petitioner was wrongfully discharged under Ohio Revised Code 4141.29 (D)(2), Ohio Law, and is Res Judicata applicable in this case?

(d) Did the District Court and the District Court of Appeals commit error in refusing to grant Petitioner leave to file an Amended Complaint to conform to the facts after discovery?

II.

LIST OF PARTIES

Patrick M. Zill,
Plaintiff-Appellant below.

Avis-Rent-A-Car Systems, Inc.
Defendant-Appellee below.

TABLE OF CONTENTS

Questions Presented for Review I

List of Parties II

Opinions Below 2

Grounds of Jurisdiction of Supreme Court 3

Constitutional and Statutory Provisions 4

Statement of the Case 6

Basis for Federal Jurisdiction in the Court of First Instance 8

Reasons for Granting the Writ 9

I. There is a denial of the Due Process when the District Court ruled on Summary Judgment Motion without a hearing and decided that Petitioner was an at-will employee 9

A. When the employer extends itself in a dual capacity towards its employee it has a duty to perform as mediator 11

II. The District Court erred in failing to find that Petitioner was wrongfully discharged, and that in the absence of an appeal from the decision of the Ohio Bureau of Employment Service, the decision is Res Judicata 13

III. The District Court committed error prejudicial to Petitioner in refusing to grant Petitioner leave to file an amended complaint. 13

IV. The District Court and the Court of Appeals erred in failing to find that Petitioner was wrongfully discharged under Ohio Revised Code 4141.29 (D)(2), Ohio Law and Res Judicata is applicable in this case 14

Conclusion 15

Appendix:

Opinion of the Court of Appeals for the Sixth Circuit (filed March 7, 1989) A1

Opinion and Order of the United States District Court (filed June 28, 1988) A3

Decision and Order of the United States District Court (filed January 6, 1988) A8

Order of the United States District Court (filed November 12, 1987) A9

Order of the United States District Court (filed November 3, 1987) A10

Ohio Bureau of Employment Services Determination of Benefits A13

TABLE OF AUTHORITIES

Texts

Anderson v. Liberty Lobby, Inc., 54 U.S.L.W. 4755, 477 U.S. 242 (1986) 3,10,11,15

Birmingham Fire & Insurance Co. v. River Downs Race Track, 260 Ohio App. 3d 139 3,13

Hoover, et al. v. Sumlin, Randolph Township, 12 Ohio St. 3d 1 3,14

Scheuer v. Rhodes, 416 U.S. 232, 40 L. Ed 3d 90 ... 12

Societe Internationale v. Rogers, 357 U.S. 197 12

Constitutional Provisions and Statutes

U.S. Const., Amend. XIV 4

Ohio Rev. Code 4141.29 4,14

28 U.S.C. 1331(b) 8

Rules

Fed. R. Civ. P. 15(a) 5,13,14

Supreme Court Rule 17 3,4,10,11

No. _____

IN THE

United States Supreme Court

October Term, 1988

PATRICK M. ZILL,
Petitioner,

vs.

AVIS-RENT-A-CAR SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Petitioner, Patrick M. Zill, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States District Court and the United States Court of Appeals, Sixth Circuit, entered in the above entitled proceeding March 7, 1989.

This appeal arises from a civil action for wrongful discharge on a summary judgment proceeding.

Jurisdiction of this Court is invoked under the provisions of Title 28 §1254.1.

OPINIONS BELOW

Opinion March 7, 1989 of the United States Court of Appeals for the Sixth Circuit is not recommended for publication.

Order June 28, 1988 by George C. Smith, United States District Judge.

Decision and Entry January 6, 1988 by George C. Smith, United States District Judge.

Order November 12, 1987 by James L. Graham, United States District Judge.

Order November 3, 1987 by James L. Graham, United States District Judge.

Ohio Bureau of Employment Services Determination of Benefits Claim for week ending March 31, 1984.

All Opinions Below will appear in the Appendix.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from a civil action for wrongful discharge on summary judgment proceeding. The United States Court of Appeals, Sixth District, affirmed the judgment of the lower Court on March 7, 1989.

The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254 (1).

Cases that sustain the jurisdiction of this Court include:

(1) *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755, 477 U.S. 242 (1986).

(2) *Birmingham Fire & Insurance Co. v. River Downs Race Track*, 260 Ohio App. 3d 139.

(3) *Hoover, et al. v. Sumlin, Randolph Township*, 12 Ohio St. 3d 1.

The denial of the right to a jury trial as provided for in the Constitution of the United States, is the ground on which we are seeking the help of the highest Court.

Rule 17(a) and Rule 17(2) are applicable in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Statement of the Grounds on which jurisdiction of this Court is invoked:

> Supreme Court Rule 17 states under what circumstances a Decision may be appealed: "The United States District Courts have so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision."

Constitutional Provision, Statutes, Administrative Decisions:

> Constitution of the United States:
>
> Amendment XIV of the United States Constitution:
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State, wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> Ohio Revised Code 4141.29:
>
> **4141.29 Eligibility and qualification for benefits**
>
> Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions stipulated in sections 4141.01 to 4141.46 of the Revised Code.
>
> (A) No individual is entitled to a waiting period or benefits for any week unless he:

(1) Has filed a valid application for determination of benefit rights in accordance with section 4141.28 of the Revised Code;

(2) Has made a claim for benefits in accordance with section 4141.28 of the Revised Code;

(3) Has registered at an employment office or other registration place maintained or designated by the administrator of the bureau of employment services. Registration shall be made in person or in writing in accordance with the time limits, frequency, and manner prescribed by the administrator.

* * * * *

Federal Rules of Civil Procedure, Rule 15:

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever may be the longer, unless the court otherwise orders.

* * * * *

STATEMENT OF THE CASE

On August 4, 1983 Petitioner entered into a contract with Respondent which contained provisions through Respondent's manual, wherein Petitioner would have job security, as an *Avis-Non-Union Employee.*

On March 17, 1984 Petitioner was fired by Respondent "on the spot", with no warning, in violation of the contract.

On or about March 19, 1984 Petitioner applied for unemployment compensation with the Ohio Bureau of Employment Services. The following determination was made: "Claimant was discharged by Avis-Rent-A-Car Systems, Inc. because the employer felt his job performance was unsatisfactory. No facts have been presented that would establish any misconduct or neglect on the part of the claimant to have caused the separation. Within the meaning of the law, claimant is not subject to any disqualification resulting from this discharge. Claim for week ending March 31, 1984 is allowed."

Though the contract provided for Avis-Non-Union Employees strict termination of employment rules, which provided for oral warnings, written warnings, and appearances before the body which decided upon termination of employment, Respondent summarily breached the contract and failed to act in its dual capacity as a Non-Union Mediator and employer.

On March 28, 1984, after the firing of Petitioner, Respondent mailed a letter purported to be a warning, which was 6 days after Petitioner was fired.

On March 15, 1985 Complaint was filed in Franklin County Court of Common Pleas, Case Number 85-C-2-03-1469, endorsed thereon Jury Demanded, Action in Wrongful Discharge.

On March 22, 1985 Respondent filed its notice and petition for removal of the action to the United States District Court for the Southern District of Ohio under 28 U.S.C. 1331 Labor Dispute. On May 9, 1985 action was transferred.

On May 17, 1985 answer by Respondent was filed denying the pertinent allegations in the complaint. On October 22, 1987 Respondent filed its motion for summary judgment. Federal question was raised at the time motion for summary judgment was filed.

The case was assigned to Judge James Graham, in the court of first instance who denied motion for summary judgment.

On November 12, 1987 Respondent filed its memorandum to vacate Judge Graham's decision.

On December 11, 1987 notice was given this case was transferred to Judge George Smith.

January 4, 1988 Petitioner filed a motion to amend the complaint to conform with new evidence through discovery to wit: The reason for firing was because of old age.

February 18, 1988 Respondent filed its motion to reconsider the decision rendered by Judge James Graham on the dismissal of the motion for summary judgment.

February 29, 1988 Petitioner filed his memorandum contra the motion to reconsider Judge James Graham's decision.

June 6, 1988 motion to amend complaint overruled by Judge George Smith.

June 6, 1988 Appellant's memorandum contra dismissal of case.

June 28, 1988 Judge George Smith sustained Respondent's motion, vacated Judge James Graham's decision, and dismissed the case.

July 8, 1988 motion to reconsider dismissal, was not ruled on.

United States District Court of Appeals rendered an opinion affirming judgment of the District Court March 7, 1989.

The basis for Federal Jurisdiction is the Denial of Due Process, commencing in the court of first instance through the Court of Appeals.

Basis for Federal Jurisdiction in the Court of First Instance

Basis for Federal Jurisdiction in the Court of First Instance was invoked under diversity of citizenship—Labor Dispute 28 U.S.C. 1331 (b).

ARGUMENT OF REASONS FOR GRANTING THE WRIT

I. There is a denial of the Due Process when the District Court ruled on Summary Judgment Motion without a hearing and decided that Petitioner was an at-will employee.

The Court could not have arrived at the conclusion that Petitioner was an at-will employee if the Court's decision was made on the facts in the case, which includes the pleadings, the memoranda contra motion for summary judgment, answers to interrogatories, affidavits of Robert Schmidt and Appellant, depositions, joint Appellee's Exhibit B, being *Avis Employee's Manual*, Appellee's Joint Exhibit A, Plaintiff's Exhibit 2.

In response to Respondent's newspaper advertisement, Appellant's Exhibit 7, Petitioner was interviewed by Respondent's agent as shown in Petitioner's supplemental affidavit filed March 8, 1988. Petitioner when asked by Respondent's agent why he wanted to work for Respondent, stated "I want a job with Avis because it is a protected job; the advertisement attracted me as it offered a pension plan, hospitalization, and you will become a vested employee, and on this job, you just can't be hired and fired". Respondent's agent told Petitioner that he would not earn anymore than "$25,000.00 a year with Avis". Petitioner stated that "he wanted security, a protected job, and all the benefits" which were more important to Petitioner than "higher wages".

Petitioner accepted the offer made by Respondent and signed the "Sign-On" page, whereby he became an Avis Non-Union Employee, as outlined in the employee's manual.

To support the fact that Petitioner was denied his Constitutional rights and Rule 17.2 of the Rules of the Supreme Court of the United States as amended:

> "17.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."

Also, Rule 17 (a):

> ". . . . .or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

We urge the Court to examine the interplay between the two opinions which agreed upon sustaining the motion for summary judgment. The decisions do not conform to the facts in the case before this Court.

We urge the Court to examine the decision and order of Judge James Graham which were overruled by Judge George Smith. The Court of Appeals affirmed the lower Court by stating that the lower Court did not abuse its discretion in sustaining the motion for summary judgment; but neither decisions of Judge Smith's and the Court of Appeals were based on the facts in the case before this Court.

To show that the motion for summary judgment should not have been sustained we call the Court's attention to *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755 (1986):

> ". . . . .It is clear enough from our recent cases that at the summary judgment stage the Judge's function is not himself to weight the evidence and

> determine the truth of the matter but to determine whether there is a genuine issue for trial."

There are many cases cited in the *Anderson* case, but the best analysis of the *Anderson* case is found in Justice Brennan's and Justice Rehnquist's dissenting opinions have made a very good analysis of *Anderson v. Liberty Lobby* judgment.

Judge George Smith used the following sentence from *Anderson v. Liberty Lobby*:

> "The Supreme Court concluded in Anderson that a judge considering a motion for summary judgment must 'ask himself not whether he thinks the evidence unmistakenly favors one side or the other, but whether a fair-minded jury could return a verdict for the Plaintiff on the evidence presented."

But the fact remains *Anderson v. Liberty Lobby* states:

> "In relying on a motion for summary judgment, the Court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponents are indulgently treated."

The pleadings in Petitioner's case were not looked upon at all; they were ignored.

For the reason above, we urge the Court to consider Rule 17 (a) and amendment 17.2.

A. When the employer extends itself in a dual capacity towards its employee it has a duty to perform as mediator.

Respondent failed in its role as a mediator towards Petitioner by completely ignoring its Rules and Regulations in matters of termination. The Exhibit

marked Number 2 states *"Avis-Non-Union-Employees"*. There is a contract between Petitioner and Respondent. Ohio Bureau of Employment Services ruled that Petitioner was wrongfully discharged.

Ohio Courts are holding that a ruling by the Ohio Bureau of Employment Services when there is a failure to appeal is Res Judicata.

Judge Graham based his decision to dismiss the motion for summary judgment on the authority of *Scheuer v. Rhodes,* 416 U.S. 232, 40 L. Ed. 3d 90.

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claim."

Rule 37 was construed by the Supreme Court of the United States prior to its latest amendment. Part of Mr. Justice Harlan's opinion is as follows:

Societe Internationale v. Rogers, 357 U.S. 197

> "The provisions of Rule 37 which are here involved must be read in the light of the provisions of the Fifth Amendment that no person, shall be deprived of property without due process of law, and more particularly against the opinions of this Court which establish that there are constitutional limitations upon the power of Courts, even in aid of their own processes, To dismiss an action without affording a party the opportunity for hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations."

II. The District Court erred in failing to find that Petitioner was wrongfully discharged, and that in the absence of an appeal from the decision of the Ohio Bureau of Employment Service, the decision is Res Judicata.

The Courts should have considered that the Ohio Bureau of Employment Services determined that Petitioner was wrongfully discharged. The decision was not appealed by Respondent. The fact that he was wrongfully discharged should have been considered by the Court, in the absence of an appeal from the decision of the Ohio Bureau of Employment Services.

III. The District Court committed error prejudicial to Petitioner in refusing to grant Petitioner leave to file an amended complaint.

The Court committed error in denying Petitioner the right to amend the complaint in order to conform to the facts from the depositions and affidavits that Appellant was fired because he was too old. That the claim for $3,090. for earned commissions was overlooked through inadvertence when the Complaint was filed. Not to grant an amendment would amount to unjust enrichment. A motion for leave to amend a pleading made pursuant to Civil Rule 15(A) should be granted freely when justice so requires.

The District Court committed error in denying Appellant the right to amend the complaint to conform to the facts found in the depositions. Civil Rule 15(A) was intended to be liberal in granting litigants, in the interests of justice, the right to amend pleadings.

Birmingham Fire and Insurance Co. v. River Downs Race Track (1985), 26 Ohio App. 3d 139

"Civ. R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party."

Hoover et al., Appellants v. Sumlin, Randolph Township Appellee, et al. (1984), 12 Ohio St. 3d 1

"1. A motion for leave to amend a pleading made pursuant to Civ. R. 15(A) should be granted 'freely' when justice so requires."

It was necessary to amend the complaint in order to show under what circumstances Appellant was wrongfully discharged. Under what circumstances Appellant is due the sum of $3,090.00 for commissions earned, was also brought out in the amended complaint.

The District Court in the dismissal of the motion to amend stated that another suit should be filed in order to recover the $3,090.00 from Appellee. It is our position that if another suit were brought in to recover the sums due for commissions, Appellee could well raise the question of Res Judicata as a defense.

IV. The District Court and the Court of Appeals erred in failing to find that Petitioner was wrongfully discharged under Ohio Revised Code 4141.29 (D)(2), Ohio Law and Res Judicata is applicable in this case.

The Ohio Courts have been holding that determinations by the Ohio Bureau of Employment Services if not appealed may be preclusive.

We urge the Court to certify the writ in this case to make a determination on the points involved in this case.

CONCLUSION

There is a denial of due process in this case. We urge the Court to certify the Writ of Certiorari in order to re-examine the controversy between the different opinions and facts in this case.

There are too many persons in our country who are deprived of their constitutional rights by means of summary judgment process. The under-privileged may obtain help from various organizations and agencies; however, the common worker cannot litigate his case due to their lack of funds. Judges should be discouraged from disposing of cases at the summary stage.

In the interest of justice, we urge the Court to examine this case. Although it was a very short proceeding, a very substantial right is involved, as set out in the dissenting opinions of Justice Brennan and Justice Rehnquist in *Anderson v. Liberty Lobby, Inc., supra.*

Deprivation of inalienable rights, which are granted under the Constitution, is inexcusable, and should not be permitted by any Court.

This case involves a substantial constitutional question, and is of public and great general interest.

Respectfully submitted,

THELMA C. FURRY
50 Munroe Falls Avenue
Munroe Falls, Ohio 44262
(216) 688-4047
Attorney for Plaintiff-Appellant

APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 7, 1989)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 88-3686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICK M. ZILL,
Plaintiff-Appellant,

v.

AVIS RENT A CAR SYSTEM, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: MARTIN and RYAN, *Circuit Judges*, and POTTER*, *District Judge.*

PER CURIAM. This is an appeal of a wrongful discharge case. Patrick M. Zill was hired by Avis Rent A Car System, Inc. on August 5, 1983 and after repeated warnings was fired on March 26, 1984 for failure to properly record the transactions which were required in

* The Honorable John W. Potter, United States District Court Judge for the Northern District of Ohio, sitting by designation.

his job. He sued Avis in state court and the case was removed to federal court where summary judgment was granted. We affirm.

Zill was employed under an oral at will agreement by Avis as a used car salesman in its Columbus, Ohio sales location. In this job he was required to complete a number of forms for each car that he sold. They included a buyer's order, a bill of sale, a data base form and a warranty application. Zill testified in a deposition taken before trial that he understood his responsibilities and knew that the proper completion of these forms was a part of his job. He also acknowledged that he had failed to complete these forms or had filled them out incompletely on a number of occasions. Prior to his discharge he was given at least two verbal warnings and a written warning regarding his failure to fill out the forms properly.

In granting the summary judgment the district court found that under no set of facts could Zill be, under Ohio law, anything other than an employee at will, subject to discharge at the discretion of his employer. See *Mers v. Dispatch Co.*, 19 Ohio St. 3d 100 (1985). Zill argues here that the employee handbook and the oral comments of Avis' agent created an enforceable binding employment contract. Zill offered and we can see no evidence of a meeting of the minds as to the creation of an employment contract. Thus we see no error in granting summary judgment.

Zill also argues that it was an abuse of the trial court's discretion to deny his motion to amend his complaint so as to allege a claim for past due commissions. We see no abuse in that the motion was filed after discovery was complete and just prior to a scheduled trial.

The judgment of the district court is affirmed.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 28, 1988)

Case No. C2-85-691

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

PATRICK M. ZILL,
Plaintiff,

v.

AVIS RENT A CAR SYSTEM, INC.,
Defendant.

OPINION AND ORDER

This matter is before the Court pursuant to a motion to reconsider defendant's motion for summary judgment. A motion for reconsideration of summary judgment order is treated as a motion to alter or amend judgment under Fed. R. of Civ. P. 59(e), and is within the informed discretion of the trial court. *Huff v. Metropolitan Life Insurance Co.*, 675 F.2d 119 (6th Cir. 1982). After careful consideration of the fact that the motion for summary judgment was denied originally because discovery was not complete, and discovery has now been completed, the motion for reconsideration of summary judgment is SUSTAINED. Furthermore, plaintiffs have requested oral arguments on the motion. The Court does not believe oral arguments to be necessary and the requests are therefore DENIED.

On or about August 4, 1983 plaintiff, Patrick Zill, was hired by defendant, Avis Rent-A-Car System, Inc., as a used car salesman. Plaintiff was hired pursuant to an oral employment contract for an indefinite period. On or about March 26, 1984, plaintiff was discharged for alleged improper paperwork. Plaintiff brought this action for wrongful termination seeking compensatory and punitive damages.

In considering defendant's motion for summary judgment, the Court is mindful that summary judgment is appropriate only in limited circumstances. Rule 56(c) of the Federal Rules of Civil Procedure, provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is ENTITLED to judgment as a matter of law.

The moving party bears the burden of establishing the absence of a genuine issue as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

The Supreme Court has held, however, that the standard for summary judgment "mirrors the standard for a directed verdict under [Rule 50(a)], which is that the trial judge must direct a verdict, if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, _____, (1986), (citing *Brady v. Southern Co.*, 320 U.S. 476, 479-80 (1943)); see also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Thus, the Supreme Court concluded in *Anderson* that a judge considering a motion for summary judgment must "ask himself not whether he thinks the evidence unmistakenly favors one side or the

other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson*, 477 U.S. at _____.

In this case, having considered at length the motion, memorandum contra, affidavits and depositions filed by all parties in support thereof and contra thereto, the Court does not believe that a fair-minded jury could return a verdict for the plaintiff. Rather, the Court believes that the defendants are entitled to summary judgment.

The determinative issue in this case is whether the plaintiff's employment with the defendant was an at-will employment which could be terminated without reason. The jurisdiction of this Court is based upon 28 U.S.C. §1332, diversity of citizenship. In a case before a federal court based on diversity, the Court is bound to follow the applicable state law as interpreted by the state's highest court or all available data if the state's highest court has not spoken on the issue. *Bailey v. V & O Press Co., Inc.*, 770 F.2d 601 (6th Cir. 1985). Under Ohio law, an employment contract in which the employee provides no other consideration in addition to the services incident to employment, the employee is considered an employee-at-will. *Turner v. SPS Technologies, Inc.*, No. 59145, Slip op. (Ohio Ct. App. June 4, 1987). The plaintiff, Zill, would be considered an employee-at-will.

Oral employment at-will contracts may be terminated for any or no reason as long as the reason, if there is one, is not prohibited by law unless a prior agreement has been reached. *MERS v. Dispatch Printing Co.*, 19 Ohio St. 3d 100 (1985). Therefore, plaintiff, being an employee-at-will could be terminated without reason. There are two exceptions to this rule. The first exception is that an implied contract, demonstrated by

custom, company policy, or handbooks, may modify the at-will status. *Turner v. SPS Technologies, Inc.,* No. 51945, Slip Op. (Ohio Ct. App. June 4, 1987). The *Turner* Court continued saying that in order for there to be an implied contract modifying the at-will status there must be a meeting of the minds, not merely a unilateral policy statement. Clearly, there is not an implied employment contract between the plaintiff and the defendant that would alter the plaintiff's status as an at-will employee. The handbook given to and relied upon by the plaintiff to furnish an implied contract is clearly worded as guidelines, and therefore, are merely unilateral policy statements. Hence, the first exception is not applicable here.

The second exception to the rule is promissory estoppel. In order for the doctrine of promissory estoppel to apply four elements must be present: (1) there must be a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and, (4) the party claiming estoppel must be injured by the reliance. *Turner v. SPS Technologies, Inc.* However, between the plaintiff and defendant the first element of an unambiguous and clear promise is not present. As shown in the preceding paragraphs, the policy manuals do not serve as promise to modify the termination procedure. Therefore, since the first requirement is not met, and the other elements will fall with it, the doctrine of promissory estoppel will not serve as a modification of the at-will status of the employment contract.

In conclusion, plaintiff Zill's employment with defendant Avis Rent-A-Car System is an at-will employment which can be terminated for any or no reason by either party. Moreover, the plaintiff cannot modify his status of an at-will employee by either of the available exceptions. Therefore, the defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

/s/ GEORGE C. SMITH
United States District Judge

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed January 6, 1988)

Case No. C-2-85-691

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK M. ZILL,
Plaintiff,

v.

AVIS RENT-A-CAR SYSTEM, INC.,
Defendant.

DECISION AND ENTRY

A motion to amend complaint having come before this Court, this Court determines that:

1. The claim for commissions could have been raised initially in the case. At the present time the trial is less than a month away and discovery has been completed.

2. The claim to be added has nothing to do with the wrongful discharge claim.

3. The plaintiff can obtain relief for this claim in an alternate forum.

For these reasons, it is ordered that plaintiff's motion to amend complaint is DENIED.

IT IS SO ORDERED.

/s/ GEORGE C. SMITH
United States District Judge

ORDER OF THE UNITED STATES DISTRICT JUDGE

(Filed November 12, 1987)

Case No. C-2-85-691

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK M. ZILL,
Plaintiff,

v.

AVIS RENT-A-CAR,
Defendant.

ORDER

Defendant's motion for summary judgment was heard on November 12, 1987 and for the reasons stated on the record at the conclusion of the hearing the motion was DENIED.

The Court upon its own motion reopened discovery in this matter, discovery shall be completed on or before December 31, 1987. This matter will be scheduled for another final pretrial conference and for trial early in 1988.

It is so ORDERED.

/s/ JAMES L. GRAHAM
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 3, 1987)

Case No. C2-85-691

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK M. ZILL,
Plaintiff,

v.

AVIS RENT-A-CAR SYSTEM, INC.,
Defendant.

ORDER

At the final pretrial conference held in this matter on October 22, 1987, plaintiff requested and was granted leave to take the deposition of the person in control of the plaintiff's personnel file on or before October 30, 1987. Counsel reported that otherwise discovery was complete. Counsel were directed to confer and finalize the final pretrial order in this matter. On October 27, 1987, plaintiff filed a request to supplement the final pretrial order to correspond with plaintiff's request made on the 22nd day of October, 1987. In the memorandum in support of this motion, plaintiff's counsel indicates that she desires to have the pretrial order amended to reflect leave to take the deposition of defendant's custodian of employment records and to take the deposition of two plaintiff's witnesses. There was no request for taking the

depositions of two plaintiff's witnesses at the final pretrial conference. On October 28, 1987, defense counsel hand delivered to the Court the final pretrial order signed by both counsel which, under Section VIII states:

> Plaintiff is granted leave to take the deposition of a representative of defendant who is custodian of plaintiff's employment records and all employee manuals relating to benefits on or before October 30, 1987.

The Court notes that in a preliminary pretrial order filed herein on July 26, 1985, Magistrate Abel ordered that all discovery must be completed by November 30, 1985. In light of all of the above, it is difficult for this Court to understand why counsel have not completed the taking of all depositions long before this date. Nevertheless, in the interests of justice, plaintiff's request for leave to take the depositions of two plaintiff's witnesses is GRANTED. Those depositions must be completed and filed on or before November 11, 1987.

Accordingly, plaintiff's motion to supplement final pretrial order is GRANTED on the terms set forth above.

On October 29, 1987, plaintiff filed a motion to compel discovery. In this motion, plaintiff contends that the witness who appeared in response to plaintiff's deposition notice was not aware of any "manuals or the national policy of the company." The Court notes that at the time of the final pretrial conference, plaintiff requested the deposition of the person in control of the plaintiff's personnel file. However, in the final pretrial order delivered to the Court on October 28, 1987, counsel provided that the deponent in question would also be the custodian of "all employee manuals relating to benefits."

Defendant reports that the witness appeared and testified that there was no employee manual relating to benefits. The motion to compel is DENIED.

On November 2, 1987, plaintiff filed a motion requesting the Court to continue the trial date of November 17, 1987. The motion is DENIED and this action will proceed to trial on November 17, 1987.

Plaintiff's counsel is specifically alerted to the fact that defendant filed its motion for summary judgment herein on October 22, 1987 and that this motion is scheduled for oral hearing on November 12, 1987 at 8:30 a.m. Plaintiff's counsel must complete discovery and file her response to the motion for summary judgment on or before November 11, 1987.

It is so ORDERED.

/s/ JAMES L. GRAHAM
United States District Judge

OHIO BUREAU OF EMPLOYMENT SERVICES

DETERMINATION OF BENEFITS

TO CLAIMANT:

This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. CLAIMANT'S NAME AND ADDRESS
   Patrick M. Zill
   168 Karney Place
   Gahanna, Ohio 43230

2. EMPLOYER'S NAME AND ADDRESS
   Avis Rent-A-Car Systems, Inc.
   R.E. Harrington, Inc.
   P.O. Box 1160
   Columbus, Ohio 43216

3. Local Office Number
   174-1

4. Social Security Account Number
   287-18-6527

5. Benefit Year Began
   3-25-84

6. Date Mailed
   APR 11 '84

7. THIS NOTICE IS A DETERMINATION OF:
   - [x] (a) First weekly claim
   - [ ] (b) Additional (reopened) weekly claim
   - [ ] (c) Continued weekly claim
   - [ ] (d) Other. See decision in item 8

8. REASON FOR SEPARATION:
   [ ] lack of work [x] see item 8D.
   Claim for week ending 3-31-84, is:

   A. [ ] ALLOWED

B. DISALLOWED—
Claimant's deductible income and/or earnings for the week identified above equalled or exceeded the weekly benefit amount.

C. [ ] DISALLOWED—
Claimant has not met requirements for removing a prior suspension of benefits.

D. [x] DISCHARGE
Section 4141.29(D)(2)(a) Ohio Law
Claimant was discharged by Avis Rent-A-Car Sys., Inc. because the employer felt his job performance was unsatisfactory. No facts have been presented that would establish any misconduct or neglect on the part of the claimant to have caused the separation. Within the meaning of the law, claimant is not subject to any disqualification resulting from this discharge. Claim for week ending 3-31-84 is allowed.

APPEAL RIGHTS: If you think this determination is incorrect as to fact or law, or if you have additional facts which might affect the determination, you may file a request for reconsideration in person at any bureau office. You will be given assistance in preparing your written request. If you desire, you may write directly to the local office in which the claim is filed. To be considered timely, your request must be filed in person or postmarked no later than fourteen calendar days after the date entered in item 6 on this form. If the fourteenth day falls on a legal holiday, the period for filing is extended to include the next scheduled workday. If the request is filed by mail, it should indicate the items with which you disagree, the reason for disagreement, and the social security account number shown in item 4 on this form.